

**Montana Association of Counties
Joint Powers Insurance Authority**

November 27, 2006

Jack Holstrom
Personnel Services

Administrator The Honorable Kelly Gebhardt
The Senate of Montana
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Re: Montana Workforce Drug and Alcohol Testing Act Legislation

Dear Senator Gebhardt:

In our telephone conversation, I indicated the problems that I believe arise in attempting to utilize the Montana Workforce Drug and Alcohol Testing Act, Sections 39-2-205 through 39-2-211, MCA, in County government. This has created a situation in which County government is unable to test its employees for drugs and alcohol. This is a very serious situation, as it is the belief of most County officials that County government should have the ability to test employees for drugs and alcohol

One of the main difficulties in attempting to utilize the Act for County government is that Section 39-2-205, MCA specifically includes elected officials in the definition of "employee". This creates a real problem because the Act imposes many duties and responsibilities for employers such as:

- a. imposing sanctions upon an employee for violating the employer's standards of conduct
- b. requiring an employee who tests positive to participate in an approved drug or alcohol testing program as a condition of continued employment
- c. requiring employees to do followup testing
- d. determining whether to perform reasonable suspicion testing on employees
- e. determining whether employees have presented a reasonable explanation or medical opinion indicating that the original tests were not caused by illegal use of controlled substances or alcohol consumption

As elected officials are defined in the Act as "employees," there is no employer in County government to perform these functions. Additionally, it would not be feasible to expect an elected official to impose sanctions or make other "employer" determinations upon himself or herself. This clash could be eliminated by striking the words "The term includes an elected official" from Section 39-2-206 (4) MCA.

In addition to the fatal flaw I believe results because of the inclusion of elected officials in the term employee many of the other provisions of the Act are vague enough that it is possible that a large number of employees may not be included for testing purposes. I believe there is a big question whether County road department employees

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who are not regulated by Federal drug and alcohol testing laws could be tested. Likewise, most of the County government employees such as clerical employees would not be subject to drug and alcohol testing as they are not involved with hazardous work, security positions, public safety, or fiduciary positions.

Finally, the provisions of the Act make it almost impossible for the employer to comply with statutory requirements for a qualified testing program as defined in Section 39-2-207, MCA as the requirements are vague, complex, and confusing .

My review of this Act leads to the conclusion that the Act was written for private sector employment and not public employment. It is my suggestion that a Legislative subcommittee ought to study this Act and provide proposed legislation for amendment of the Act.

We would appreciate your assistance in addressing this issue this Legislative session.

Sincerely,

Jack A. Holstrom
Attorney at Law